IN THE

United States Circuit Court of Appeals

for the Ninth Circuit

O. P. HALLIGAN, Warden of the United States Penitentiary at Bee, McNeil Island, Washington, for the United States Government (Respondent),
Appellant,

vs.

JAMES A. MARCEL (Petitioner),
Appellee.

No. [redacted]

In the Matter of the Application of James A. Marcel for a Write of Habeas Corpus.

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISRICT OF WASHINGTON, SOUTHERN DIVISION.

Brief of Appellant

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STATEMENT OF CASE.

The petitioner and appellee in this case is a United States convict in the United States Penitentiary at Bee, McNeil Island, Washington. The

respondent to the writ, and appellant, is the warden of such penitentiary.

A brief preliminary glance at the law is necessary to a proper understanding of the facts of this case.

Section one of the act of June 21, 1902 (32 Stats. at Large, 397), provides that each prisoner

> "who had been or who shall hereafter be convicted of any offense against the laws of the United States, and is confined in execution of the judgment or sentence upon such conviction in any United States penitentiary * * * for a definite term other than for life, whose record of conduct shows that he has faithfully observed all the rules and has not ben subjected to punishment, shall be entitled to a deduction from the term of his sentence," etc.

On June 25, 1910 (36 Stats. at Large, 819), Congress passed a further act providing for the parole of United States prisoners who have a good record of conduct. This parole is dependent upon the exercise of a reasonable discretion by a board of parole authorized by the act. Section two of the act provides that the prisoner shall be released upon parole

> "upon such terms and conditions, including personal reports from such paroled persons as said board of parole shall prescribe, and to remain while on parole in the legal custody and under the control of the warden of such prison

> from which paroled, and until the expiration of the term or terms specified in his sentence, less such good time allowance as is or may hereafter be provided for by act of Congress."

Section ten of the act provides

> "that nothing herein contained shall be construed to * * * in any way impair or revoke such good time allowance as is or may hereafter be provided by act of Congress."

Hereafter in this brief such acts will be referred to as the commutation act and the parole act.

On May 3, 1909, the petitioner and respondent, after conviction of a violation of the National Banking act, was sentenced by the United States District Court for the Eastern District of Washington, to serve five years in the United States Penitentiary at McNeil Island, Washington. Service of this sentence commenced May 13, 1909. On August 12, 1911, the petitioner was released on parole in accordance with the act of June 25, 1910. Counting at the rate of 8 days per month deduction from sentence for good behavior, being the rate allowed by act of June 21, 1902, as amended by act of April 27, 1907, the petitioner's sentence, at the time of his parole, was reduced to the extent of 216 days. Petitioner was out on parole for 230 days, or until

March 29, 1912, when he was returned to the penitentiary for violation of his parole, where he has since been confined. All the above facts are pleaded in the petition for the writ, paragraphs 3, 4, 5, 6 and 7, and are admitted in the return to the writ, paragraph 1. (Typewritten Record, pp 3, 9.) The violation of the parole consisted of cohabitation with another man's wife. (Cross-examination of Mr. Halligan, Typewritten Record, p. 27.)

It appeared at the trial that the prisoners were furnished two books or pamphlets. The first contained the act of June 21, 1902, providing for commutation of sentence for good behavior; also the act providing for parole (act of June 25, 1910), and the "rules and regulations for the government and discipline of the prisoners in the United States Penitentiary at McNeil Island, Wash." The rules contain no reference whatsoever, either to the conduct of the prisoners on parole or to the effect of a violation of parole, but are solely directed to the conduct of the prisoners while confined in the penitentiary. (Petitioners' Exhibit No. 1, Typewritten Record, p. 30.) The second book, given to the prisoner when the parole is granted, contains not only

the parole act, but the rules of the board of parole. These rules nowhere directly mention the effect an infraction thereof may have on commutation of sentence for good behavior, but Rule, 28, contained therein, states that the parole will be granted only on the express condition that the prisoner "will in all respects conduct himself honorably * * * and that he will live and remain at liberty without violating the laws." (Petitioner's Exhibit No. 2, Typewritten Record, p. 31.) The parole was revoked for the violation of this rule in the manner above set forth. (Testimony of Mr. Halligan, Typewritten Record, p. 27.)

Some 7 months after the prisoner's return he was handed a slip by the warden, in which his good conduct term was stated to expire on April 8, 1914, and further stating, on the back thereof, that all good time from beginning of sentence to date of release on parole was forfeited on account of the violation of parole; that no good time was earned during the parole on account of the violation thereof, and that good time was computed from March 29, 1912, being the date of the return to the penitentiary after the violation of parole. (Petitioner's Exhibit No. 3, Typewritten Record, p. 32.)

Mr. Halligan, the respondent, was not only warden of the penitentiary, but also president pro tem of the board of parole. In the cancellation of good time noted on the slip above set forth, he acted in his capacity as warden. (Testimony of Mr. Halligan, Typewritten Record, p. 27.)

On September 8, 1913, petitioner filed his petition for a writ of habeas corpus, in the United States District Court for the Western District of Washington, claiming that his confinement since September 4, 1913, had been in violation of law, for the reason that he was still entitled to the 216 days' good time allowance which had accrued when he was released on parole. (Petition, paragraphs 2 and 10.) The answer alleged that the 216 days' good time allowance, by which the sentence had been diminished at the time of the parole, was forfeited and canceled by the violation of the parole. (Answer, paragraph 6.) The answer further alleged that the sentence of petitioner, under the law governing good time allowances, paroles, and the violation thereof, does not expire until 216 days from September 5, 1913, or on April 8, 1914. (Answer, paragraph 6.)

The parole act provides that, on revocation of

parole, the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced. (Parole act, section 6.) Bearing this in mind, it is evident that the time fixed by respondent for the expiration of petitioner's sentence is obtained by deducting from the five-year sentence 8 days per month for the total sentence, less the 216 days' good time allowance claimed to have been forfeited by violation of parole, and adding the 230 days the prisoner was out on parole, as required by section 6 of the act, *supra.* The same result is obtained on the slip referred to, by allowing 8 days per month good time from the date of the return to the time when the sentence would otherwise expire, the 230 days of parole not, of course, being counted as served on the sentence. In other words, the petitioner is given full allowance for good behavior for the full five years of his sentence, except that 216 days of such allowance have been canceled by the respondent for the misconduct, breach of law, breach of rules, and punishment involved in the violation of petitioner's parole and his subsequent return to the penitentiary.

The court, after hearing the evidence, took the matter under advisement, and subsequently filed its

opinion (Typewritten Record, p. 14), and ordered the petitioner fully discharged from the custody of the warden. (Typewritten Record, pp. 20, 21.) This appeal having been taken from such order and decree, by the direction of the Attorney General, and the petitioner having been unable to give bond to answer the judgment of this court in the matter, he was again committed to the penitentiary, pending this appeal, under an order providing that, in case of reversal of the lower court, the time he should be so confined pending the appeal should be counted as served on his original sentence.

The errors assigned are all determined by the answer to this question:

Does such a violation of parole and revocation thereof, as shown in this case, justify, under the statutes, a cancellation of good time accrued at the time the parole started, and to which the convict would be otherwise entitled?

It is the contention of the appellant that the order and decree of the court is erroneous, in that it is necessarily based on a negative answer to this question.

ARGUMENT.

The answer to the question just suggested requires a close examination of the statute.

Section one of the commutation act provides that a United States convict, confined in a United States penitentiary, whose record shows that he has faithfully observed all the rules and has not been subjected to punishment, shall be entitled to a deduction from the term of his sentence. Section ten of the parole act provides that nothing contained in the act shall "in any way impair or revoke such good time allowance as is or may hereafter be provided by act of Congress." The commutation act was approved June 21, 1902. The parole act was approved June 25, 1910.

It was the theory of the petitioner and of the learned District Judge, that the "rules" referred to in paragraph one of the commutation act are rules applicable to one actually "confined" in the penitentiary; that in view of section ten of the parole law such rules cannot be considered as covering also the rules governing a convict while on parole, and that this is rendered still more evident by the fact that the book of rules given the prisoner

on confinement, and touching his conduct while in prison, particularly Rules 86 and 93, tell the convict that a violation of such rules will forfeit his good time allowance, while in the book of parole rules no such statement is made as to the effect of violation of parole.

As to the effect of these features of the printed rules it is sufficient to remark that neither the silence of the parole rules as to the forfeiture of good time by a violation thereof, nor the statement in the prison rules that a violation thereof will forfeit good time, contains any element of estoppel whatsoever. If it is the law that a paroled prisoner will forfeit his good time theretofore accrued by a violation of his parole, and a further breach of the law, then it was not necessary for the government in its rules to warn thereof. The statement that a violation of the prison rules will forfeit good time cannot be tortured into a statement that nothing else will have a like effect. Both the commutation and the parole acts are acts of grace by the government, designed to restore the convict more speedily to law-abiding citizenship, and the rules drawn thereunder have plainly the same object in view. The statement in the prison rules is only a friendly

warning applicable to the matters there dealt with, and has nothing to do with the effect of a violation of parole.

The parole rules, as noted by Judge Cushman in his opinion, are general in their nature, and the rule forbidding a violation of the law of the land does not even contain a warning that a violation thereof will result in reimprisonment. No weight, therefore, can be attached to its further failure to warn that a violation of the law would also result in a forfeiture of good time earned. Both of such results of the violation are dictated not only by the law, but by the good conscience of the convict, and a warning, while it would have been proper enough, was entirely unnecessary.

If in truth the contention of petitioner were sound, that a violation of parole does not justify a forfeiture of good time accrued prior to the parole, then a statement in the rules that such an effect would follow would be of no effect whatsoever, as contrary to law. If, on the other hand, the warden's position is sound, then a failure to so state explicitly in the parole rules is entirely immaterial. The question reverts to the proper construction of the acts of Congress.

In constructing these statutes it must always be borne in mind that they are not penal statutes to be most strictly construed in favor of the convict or accused, but acts of mercy and of trust, intended to incite good behavior and redemption of character, not by punishment, but by confidence, and that as such they should receive a construction which will meet their letter, and at the same time carry out their purpose.

The commutation act then is one giving United States convicts an opportunity to shorten the term of their punishment by their own good behavior. In extending this act of clemency to the convict, the government has defined those to whom it shall apply. It is decreed that it shall be applicable to any convict whose "record of conduct shows that he has faithfully observed *all the rules,* and not been subjected to punishment." At the time this act was passed there was no parole act, and it was not of course necessary that the act should specify both prison and parole rules. Its language would naturally follow the conditions then existing. Nevertheless the language used was broad enough to include not only the rules then in force, or applicable to the condition of convicts under the existing laws,

but also any rule which might thereafter be passed, or which might become necessary owing to a changed condition of convicts under new laws. The condition of the commutation was that the convict should have obeyed *all* the rules.

Plainly the language is broad enough, and was meant, to require that a convict, before receiving his commutation, should have faithfully observed every rule governing him as a convict, no matter what position as a convict he might hold, and no matter how changed the rules might become in order to meet his changed condition as a convict, owing to new laws. Still the condition persists that before being entitled to a commutation he must have obeyed *all the rules.*

And in this connection it must be borne in mind that, by the direct provision of the parole act, a paroled convict is still a convict serving out his sentence, and subject to rules applicable to him, not as a free man, but as a paroled convict. Section three of the parole act expressly provides that a paroled prisoner shall still be "in the legal custody and under the control of the warden of such prison from which paroled." Being under such legal cus-

tody and control, he is of course subject to rules, not the rules governing him while in actual confinement, for they are no longer applicable, but none the less rules, a violation of which will show on his "record of conduct," and for breach of which he may properly be subjected to "punishment," the same as any other convict. The language "all the rules," particularly when taken in connection with the provision of the parole act leaving all paroled prisoners in the legal custody and control of the warden, so plainly requires a compliance with the parole rules, though first known after the passage of the act, as to be susceptible of no other construction.

But it is urged that section one of the commutation act refers to prisoners "confined" in a penitentiary, and that therefore the subsequent condition requiring compliance with "all the rules" must be understood as meaning only all rules applicable to a "confined" convict. The conclusion does not at all follow. In the first place, when the act was passed, all convicts except escapes were "confined," and the word was used, not to distinguish "confined" from paroled convicts, but as a part of a phrase defining the *terms* of convicts falling within

the act. The phrase, omitting irrelevant matter, is merely "confined for a definite term other than life." No "paroled,"as distinguished from "confined," prisoners, being known to the law at the time the act was passed, and the word "confined" being merely used as a part of an apt phrase defining the terms of the convicts to whom the act was to apply, it would seem that even without the explicit provisions of the subsequent parole act, touching its effect on the commutation act, no inference could be drawn from the use of such term, that the commutation act, with all its limitations and conditions would not apply to a paroled as well as a "confined" convict. But in any event, the parole act itself, in section ten, plainly shows that the commutation act is not to be restricted to "confined" prisoners. Section three provides that the parole shall continue until the expiration of the term, "less such good time allowance as is or may hereafter be provided for by act of Congress." Section ten provides that nothing in the act shall in any way "impair or revoke such good time allowance as is or may hereafter be provided by act of Congress."

This last provision seems to have been considered by the learned District Judge as in some man-

ner mitigating against the position of the warden in this case. We fail to see how any such effect can be given it. The good time of the convict in this case was forfeited not under the parole act but under the commutation act itself. It might well be claimed that section six of the parole act, providing that on revocation of parole, the convict "shall serve the remainder of the sentence originally imposed," prevents a prisoner whose parole has been so revoked from receiving any good time whatsoever, either past or future. The language is certainly susceptible of such construction, but it is not necessary so to hold in this case, and the Department of Justice has not given the act this strict construction, preferring still to extend to the convict the privileges of the commutation act, by which, though his past good time has been forfeited by his misconduct, he may in the future gain other and further good time. It is, however, very plain that under the commutation act itself the good time already accrued was forfeited, and for a reason stated in the commutation act, to-wit, for a failure to observe "all the rules," and a subjection to punishment. The particular character of the rules arose of course out of a condition created by the

parole act, but it was the failure to observe the condition laid down in the commutation act itself which created the forfeiture of the commutation. The true intent of the provision of section ten is obviously to set at rest any possible question as to whether a paroled convict was entitled to the same good time allowance as though he were actually "confined" in the penitentiary. In other words, section ten of the parole act conclusively establishes the rule that a prisoner on parole is entitled to good time allowance. The combined effect of section one of the commutation act and section ten of the parole act is to provide that any United States convict, whether confined in a penitentiary or out on parole, whose record of conduct shows that he has not been subject to punishment and that he has faithfully observed all the rules applicable to him as a confined or paroled convict, shall be entitled to a deduction, etc. For, of course, as soon as it appears that the word "confined," in section one of the act, does not limit the operation of the act to prisoners actually in the penitentiary, then the words "all the rules," in conditions governing the application of the act, must be given an equally broad construction. The act applies to paroled as

well as to confined convicts, and therefore the rules, *all* of which must be obeyed, include the rules applicable to paroled as well as to confined convicts.

Aside from the above reasons, the forfeiture of the good time of the petitioner was justified by the requirement of the act that the convict shall not have been "subjected to punishment."

As already noted, it is provided in section three of the parole act, that the convict while on parole shall be in the legal custody and under the control of the warden. The convict is by no means a free man during the period of parole. He may be described as a "trusty," raised to the nth power. The bounds beyond which he dare not depart are the limits of residence fixed by the board (Parole Act, section three), instead of the walls of the prison or the limits of the convict quarry or farm. Instead of reporting each morning and evening at roll call, he must report at fixed times to those designated by the board. Instead of being obliged to govern his every act by the strict requirements of prison discipline, he is required to live an honorable and upright life, free of reproach to all men, and to avoid violation of the laws of the land. (Parole Act, section 28.) Instead of following the rigid require-

ments of the prison as to food and drink, he is required only to avoid the frequenting of saloons. These requirements are not onerous, but they are essential to the retention of his high standing as a convict on parole.

The division of convicts into classes, entitled to certain privileges in accordance with their behavior, is a matter of common knowledge, and is shown also by the prison rules introduced in evidence. One of the most frequent forms of punishment for misconduct is the demoting of a convict from a higher to a lower class, with the accompanying loss of privilege. Such punishment of a prisoner confined within the walls of a penitentiary is fixed by the rules governing his conduct while therein. The same punishment as to a paroled convict is determined by the parole act itself. The return of a convict to the penitentiary for violation of parole is a punishment of identical character with that inflicted upon the convict within the walls who is demoted for misconduct from a higher to a lower class. In each case the convict is "subjected to punishment." Thus it plainly appears that the petitioner in this case, when his parole was revoked for misconduct, was "subjected to punishment," and

comes within the exact terms of section one of the commutation act. By the express terms of the act, having been so subjected to punishment, he was no longer entitled to the good time which would otherwise have accrued to him.

The conclusion that good time earned prior to parole is forfeited by misconduct resulting in the revoking of the parole is not only in accordance with the terms of the act, as we have endeavored to show, but is also plainly within the spirit and purpose of the act. As we have already seen, the acts taken together plainly show Congressional intent that a prisoner behaving himself on parole should receive the same commutation of sentence as follows the good conduct of a prisoner actually confined within the walls. Good behavior on parole thus results in a shortening of the sentence. It is scarcely credible that it was the Congressional intent to allow a paroled prisoner a commutation of his sentence for good behavior while on parole, and at the same time do away with any forfeiture of such good time by misconduct while on parole. It would be illogical and absurd to give a paroled convict all the benefits of good behavior without at the same time depriving him of those benefits in case of misbehavior.

This argument seems so plain as to need no further elucidation.

The sustaining of petitioner's contention would result in a palpable injustice. Let us suppose another convict (called Convict A), sentenced for the same period, and whose term commenced on the same date as that of petitioner; either because Convict A was a second offender or because he seemed to need further restraint before being granted the privilege of parole, the parole board did not grant him such privilege, though at the time he had been guilty of no infraction of prison discipline and had earned the 216 days also earned by petitioner. The petitioner, we will say, on the 100th, instead of 230th day of parole, violated his parole by abusing the confidence reposed in him by the parole board and by a vicious violation of the laws of the land. Suppose on the same day Convict A violates such a prison regulation as would forfeit his good time theretofore earned. Such violation would almost necessarily be far less of an offense against society and the purpose of the government in the passage of the commutation and parole acts, than was the perfidious abuse of confidence constituting petitioner's violation of parole in this case. Nevertheless,

under petitioner's contention, Convict A would be deprived of all of his good time, while petitioner would be merely returned to the penitentiary, and with his sentence 116 days nearer completion than that of Convict A, who had been guilty of a far less offense, both morally and legally. The 216 days earned by petitioner prior to his parole would still be credited to him on his sentence. Giving him credit for this, and requiring him to serve at the close of his term the 100 days he had been on parole, he would still obtain his freedom 116 days earlier than his fellow convict who had been guilty of far less. And all this in addition to having had a 100 days' vacation from the restrictions of prison life. Such might well be the result of a violation of parole, and would in truth always be the result where the convict was out on parole a less number of days than he had earned good time prior to the parole. Certainly Congress never had any such unjust intent.

Furthermore, petitioner's contention is in violation of the spirit of the commutation and the parole acts. These acts are founded on the theory that the return to good citizenship may be most readily secured by extending clemency to those convicts who

show by their works a desire to re-establish themselves on the plane of good citizenship, and by exacting the full sentence from those convicts whose acts show a continued and perverse rebellion against the obligations resting upon members of civilized society. By these acts a convict is given the opportunity to choose for himself between mercy and a strict enforcement of his sentence. By his own good conduct he obtains the former; by his own misconduct he is left to suffer under the latter. To grant him the privileges of good conduct without depriving him of those privileges for misconduct is to defeat not only the letter but the spirit of the law.

So far as we have been able to ascertain, there are no adjudicated cases throwing any light on the question presented by this case. The question is one of statutory construction in a comparatively new branch of the law, and must be determined by the letter and spirit of the law rather than by the rule of *stare decisis*. We wish, however, to submit to this court the opinion of the Attorney General of the United States upon this very question. The opinion has not been published, and is addressed to Warden Halligan in response to a question from him touching the identical point now under dis-

cussion. While, of course, this opinion is not binding on the courts, we nevertheless wish to submit it to your attention as the judgment on this question of the chief official of that department of the government having to do with the enforcement of these acts, and also as the opinion of a distinguished lawyer and jurist. It summarizes in a few words what we have endeavored to express in this brief, and reads as follows:

"DEPARTMENT OF JUSTICE,

Washington,

October 21, 1912.

Warden, United States Penitentiary,
McNeil Island, Washington State.

Sir: For your information and guidance in cases of paroled prisoners returned to the penitentiary for violation of parole, you are advised that I have decided that a prisoner whose parole has been revoked by the Board of Parole on account of violation of the conditions of parole under Section 6 of the Act of June 25, 1910, forfeits such good time allowances as he may have earned under the provisions of the Act of June 21, 1902 (32 Stats. 397).

Good time allowance under that statute is granted to a prisoner

> 'whose record of conduct shows that he has faithfully observed all the rules and has not been subjected to punishment.'

A prisoner who is liberated on parole is still, by virtue of Section 3 of the Parole Act,

> 'in the legal custody and under the control of the warden of such prison from which paroled,'

and if he violates the conditions of his parole, the fundamental one of which is, as provided in Section 3 of the Act, that he

> 'will live and remain at liberty without violating the laws,'

he certainly has not faithfully observed all the rules within the meaning of the Act of 1902 and is not, therefore, entitled to the good time deduction.

The provisions of Section 10 of the Parole Act to the effect that nothing herein contained shall be construed to

> 'in any way impair or revoke such good time allowances as is or may hereafter be provided by Act of Congress,'

are not at variance with the construction, because the law authorizing the good time allowance itself

makes it dependent upon the faithful observance by the prisoner of all the rules.

(Signed) Geo. W. Wickersham,
Attorney General."

It thus appears, both by reason and by the only authority available, that the contention of the petitioner is not well founded, and that the law justifies, and indeed requires, the forfeiture of good time earned prior to parole, by such a violation of the parole as is shown by the records in this case.

We therefore respectfully pray that the judgment of the lower court be reversed, and that the petitioner be remanded to the custody of the warden of the United States penitentiary at McNeil Island, to serve the balance of his term.

Respectfully submitted,

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